IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 61 OF 2006

Mr. Sailesh Mapari
S/o. Ladu Mapari
R/o H. No.25,
Moitem, Assonora
Bicholim – Goa.
Presently lodged in
Central Aguada Jail Goa. ... Appellant

versus

State of Goa
Through Public Prosecutor,
High Court, Panaji Goa. ... Respondent

Mr. M. Teles with Mr. R. Satardekar, Advocates for the Appellant.

Mr. C. A. Ferreira, Public Prosecutor for the Respondent.

CORAM : R. S. MOHITE &
N. A. BRITTO, JJ.

DATE : 5TH SEPTEMBER, 2007.

J U D G M E N T(Per N. A. BRITTO, J)

This appeal is by the accused who has been convicted and sentenced to suffer life imprisonment and to pay a fine of Rs.5000/- under Section 302 I.P.C.

2. The accused, aged 23 and the deceased Sagar Chodankar, aged 26, were not only neighbours at Moitem, Assonora but were friends who always moved together and also worked for Goa Telecommunication Limited at Mapusa.

3. On 1-9-2004 at about 2.00 p.m. they went together on a motor cycle, being used by the deceased and belonging to his uncle PW22/Rajendra bearing No. GA-01-F-2899, to Jerry's bar at Assonora owned and managed by PW9/Jeronimo and PW14/Ivor and sat in one of the rooms of the said bar and ordered for a half bottle of Kingfisher beer and a half quarter of rum and two packets of grams. This was when PW14/Ivor was at the counter of the said bar.

4. The incident took place at about 3.00 p.m. or so when PW9/Jeronimo was at the counter of the said bar and when he heard one of them saying “don't hit”, “don't hit”(marnaka re, marnaka re) and he went to see in the fourth room of the bar, where they were sitting, he saw the accused assaulting the deceased with a knife and the accused asked him as to what he was doing there and told him to get out, and, when he shouted for help, no one came and therefore he went on his motor cycle to the Assonora Police Out-Post and informed PW21/H. C. Parab at about 3.30 p.m. that a fight was going on in his bar between two persons, pursuant to which PW21/H. C. Parab made a station diary entry and along with PW23/Constable Prashant came directly to the said Jerry's bar while PW9/Jeronimo first went to his house and collected his brother PW14/Ivor and reached the bar.

5. PW21/H. C. Parab saw the said motor cycle standing outside the bar and the accused standing near it and PW9/Jeronimo told him that the accused was a person who was fighting and the accused was apprehended and taken inside the said Jerry's bar where PW21/H. C. Parab saw, in the third room, one man lying with injuries to his chest and one knife with a black colour handle on the table and he kept the accused and PW23/Constable Prashant there and went to a STD booth and informed the Police Control Van(P.C.R) as well as the Mapusa Police Station Duty Officer and requested them to send a jeep and also told the Duty Officer at Mapusa Police Station to inform the Police Inspector of Mapusa Police Station.

6. P.C.R Robert 3 reached the scene and took the injured/deceased to Asilo Hospital where he was declared as brought dead. PSI Arjun Naik who was the Duty Officer then reached the scene and brought the accused to Mapusa Police Station. PW26/Police Inspector Shri Tavares reached the scene on his own and recorded the complaint of PW1/Vithal, a cousin of the deceased, and the statements of PW9/Jeronimo, PW14/Ivor, PW21/H. C. Parab and PW23/Constable Prashant and returned to Mapusa Police Station and conducted the arrest panchanama of the accused in the presence of PW8/Gokuldas, a member of Panchayat and a social worker and one Subodh Salgaonkar and in the course of the said panchanama attached the green colour sleeveless banyan(Exh.1), blue half jean pant(Exh.2) worn by the accused and a gold chain(Exh.3) found in his pocket. The said gold chain was weighed by PW17/Pramod, a goldsmith and found to be 15.150 gms. and which according to

the said PW17/Pramod was earlier purchased by PW19/Laxmi, the mother of the deceased and the latter as well as the sister of deceased, PW6/Rupali, identified the same subsequently as being used by the deceased and for which PW19/Laxmi had paid an amount of more than Rs.8,500/-.

7. PW26/P.I. Shri Tavares returned to the scene at about 17.25 hours and conducted the scene of offence panchanama in the presence of PW10/Norberto and one Rosario Silva and in the course of the said panchanama attached the knife which was on the table in the third room and which had a plastic handle of 5 inches and blade of 8 inches and which blade was slightly bent. He also attached a locket with hook, with letter 'S' found fallen on the floor which was also identified by PW6/Rupali and PW19/Laxmi. PW12/Shri Kanekar took photographs of the scene and Shri Radhakrishna a finger print expert examined the scene for possible chance prints but no chance prints could be lifted nor any prints could be seen on the handle of the said knife.

8. The inquest panchanama was conducted at Asilo Hospital on the next day at about 8.45 hours in the presence of PW13/Jeevan and one Kusta Gaokar. PW13/Jeevan stated that the entire face of the deceased was covered with blood. He also gave some details of the wounds found on the body of the deceased and further stated that in the course of the said panchanama blood stained blue colour tee shirt with red design and a banyan(Exh.11(a) and (b)), and a cream colour half jean pant(Exh.12), a blue colour underwear(Exh.13) were

attached, packed and sealed belonging to the deceased.

9. The autopsy was conducted by PW18/Dr. Madhu Ghodkirekar on 2-9-2004 at the request of the said Police Inspector and according to him there were blood stains on the chest and palms of the deceased. PW18/Dr. Madhu found on the deceased 24 injuries which were all fresh and ante-mortem in nature. He has given details of the injuries which he found on the body of the deceased. We do not propose to reproduce herein all the details of the said injuries. According to him, injury nos.1 to 14 were incised/stab wounds which were caused by sharp, cutting and penetrating weapon and injury nos.15 to 24 were defensive wounds and these, as described by him, were on either side of the palms/fingers of the deceased. As per PW18/Dr. Madhu the injuries which resulted into the death of the deceased are as follows:-

> **Injury No.9**:- Stab wound transversely present over left side sub clavicular region of chest in midclavicular line just below lower border of clavicle and 141 cms. above left heel. Its skin opening is of 3.5 cms. x 2.5 cms. fish tailing shape and lateral end is acute angle. Then it has entered in the chest cavity by making 3.2 cms. x 0.3 cms. size cut in the space between lower border of clavicle and 1st rib of left side thereby making wound of 2 cms. x 0.3 cms. x 2.2 cms. for apicals of upper lobe of left side lung. The total length of stab wound is 5.8 cms. and it is directed backwards, downwards over left side of chest.
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> **Injury No.10**:- Stab wound of 3.1 cms. x 0.6 cms. x 7 cms. fish tailing shape with acute angle at lateral end, transversely present over

upper front of right side chest in 2nd intercoastal space, 6 cms. above right nipple 9 cms. lateral to mid line, 135 cms. above right heel. After cutting underlying skin, subcutaneous tissue and intercoastal muscle in an area of 3 cms. x 0.5 cms., it has entered in chest cavity in a direction of downwards, backwards, medially thereby entering upper lobe of right lung through its anterior surface to make a stab injury for it of 2.5 cms. x 0.4 cms. x 4 cms. size reaching upto the medial border of the lung.

Injury No.11:- Stab wound of 3 cms. x 0.5 cms. x 0.6 cms. size fish tailing shape with acute angle at medial end, present obliquely in left 3rd intercoastal space of left side chest at coasto-condral junction level, with upper medial end just lateral to mid-line and 6 cms. below sternal knotch whereas lower lateral end is 1 cm. lower than upper medial end. Lower lateral end of this injury is 133 cms. above left heel. It has cut corresponding skin, subcutaneous tissue and then has made cut for lower portion of left 2nd rib obliquely for a length of 2.5 cms. at coasto-condral junction and also 0.5 cms. portion cut for intercoastal muscle in one line. Thus it has entered in chest cavity in downwards, backwards and lateral directions. Finally it has made stab injury of 2 cms. x 0.4 cms. x 3 cms. for lower and medial aspects upper lobo left lung.

Injury No.12:- Stab wound of 3 cms. x 0.6 cms. x 12 cms. fish tailing shape with acute angle at upper lateral end, present slight obliquely over left fourth intercoastal space region of front chest, at the level of left nipple and 6 cms. medial to it and 2 cms. laternal to sternum, 11 cms. below left clavicle and 131 cms. above left heel. The medial lower end of this injury is placed 0.5 cms. lower than its upper lateral end. After cutting skin subcutaneous tissue, intercoastal muscle of 4th intercoastal state it has entered chest cavity in backwards, lateral and slightly upwards

> directions. Hence it has cut pleura and then ascending aorta, 2 cms. above its origin for its one third of circumference(2 cms.) passing through the lumen of aorta. Finally it has entered left atrium cavity of heart by making stab wound of 1 cms. x 0.3 cms. x 2 mm size for myocardium of heart.

10. PW18/Dr. Madhu also examined the accused on 1-9-2004 and found on him a superficial incision of 1 cm. length and 1 cm. width tailing medially downwards over the left palm and another stitched incised wound of 1.5 cms. length by one stitch over dorsal aspect of left palm at the knuckle of left middle finger, which injuries as per his opinion, were caused by sharp weapon and were simple in nature and were within 24 hours of duration.

11. Needless to say, the case of the prosecution is that it is the accused who intentionally committed the murder of the deceased by inflicting the said injuries with knife(Exh.7).

12. However, it is the case of the accused that he and the deceased were heavily drunk at Jerry's bar and while they were drinking one unknown person entered the bar from the back door and asked the deceased for a cigarette and because of that there was a quarrel between them and in the meantime he went out of the bar through the back door to answer nature's call and when he returned he saw the said unknown person was assaulting the deceased and he tried to separate both of them and at that time he sustained injuries. As per the accused, the said

unknown person gave stab injuries on his body by knife and then threatened him of dire consequences and warned him to leave the place and out of fear he stood outside the bar and after some time he was taken to the Police Station.

13. The case of the prosecution is based on the ocular evidence of PW9/Jeronimo as well as circumstantial evidence, particularly the evidence of the clothes of the accused having been found with blood of the blood group of the deceased.

14. As far as the evidence of eye witnesses is concerned, the case of the prosecution rests essentially on the evidence of PW9/Jeronimo, PW14/Ivor, PW21/H. C. Parab and PW23/Constable Prashant.

15. As stated by PW14/Ivor the accused and the deceased had come on a motor cycle bearing No.GA-01-F-2899 at about 2.00 p.m. As already stated the accused has not at all denied his presence in Jerry's bar along with the deceased at the relevant time. PW14/Ivor after describing as to what they were wearing, stated that they ordered half Kingfisher beer, half quarter rum and two packets grams and at about 2.30 p.m. after PW9/Jeronimo came to the bar, he went for lunch and the said two persons were still sitting there. According to him, PW9/Jeronimo came to the house at about 3.30 p.m. in a nervous situation and informed him that there was a fight going on in the bar between the two persons who were sitting there and then both of them went to the bar and when he went there he saw the accused in

the bar soaked with blood and the other person was found fallen in a pool of blood and there were blood stains on the wall of the room where the deceased had fallen. He also stated that he saw a knife on a table in the third room with blood and the blade slightly bent and which knife had a plastic handle. He also stated that the said knife did not belong to them. Although, this witness was cross-examined at length there was nothing elicited in his cross-examination to doubt his version.

16. PW9/Jeronimo stated that the incident took place at about 2.30 p.m. to 3.00 p.m. when the accused along with Sagar(deceased) were having drinks in the bar, and, when he was at the counter of the said bar, he heard one of them saying “don't hit”, “don't hit” and he went in the said fourth room, and he saw the accused assaulting Sagar(deceased) with the knife and the accused was full with blood and the deceased Sagar fallen down on the ground and the accused asked him what he was doing there and told him to get out. He stated that he shouted for help and no one came and as such he went to the Out-Post at Assonora and brought the Police at the spot. He also stated that he saw the accused with a knife in his hand, when he shouted at him. He stated that at that time the accused was wearing a grey colour tee shirt and a short faded jean pant. He stated that the Police came to the spot and at that time the accused was sitting on the said motor cycle which was outside the bar. He stated that the Police took Sagar in their jeep to Mapusa and thereafter he came to know that Sagar had died. He stated that he had noticed blood on the table and the wall as well as on the floor of the third and the fourth rooms and had also seen a knife on the table of the third room in the bar,

the blade of which was slightly bent and its wooden handle which was slightly broken. He identified the said knife(Exh.7), the dark blue sleeveless tee shirt of the accused(Exh.1) and the faded half jean pant(Exh.2). In cross-examination he stated that one cannot see what transpires in the third room of the bar by sitting on the counter of the bar. He also stated that he could not tell the name of the persons who told him the names of the accused and the deceased. He also stated that he could not say as to on what part of the body of Sagar, the accused assaulted him or how many times this assault was done. He denied the suggestion that when the deceased was being assaulted by a third person, the accused intervened to rescue the deceased and in the process accused was injured. He confirmed that he had narrated the incident to the Police when they came to the bar and his statement was recorded thereafter. He also stated that he was present when the panchanama of attachment of knife was drawn.

17. Learned Counsel on behalf of the accused contends that PW9/Jeronimo is the only eye witness examined by the prosecution but his evidence is not wholly reliable as he has made three inconsistent statements and therefore the accused could not have been convicted on the basis of his evidence. As per learned Counsel, in case PW9/Jeronimo had seen the accused assaulting the deceased with the knife he should have been in a position to tell the Court on which part of the body of the deceased the accused had assaulted. Learned Counsel further submits that in case he had seen the assault he would have been able to tell the Court in which position the deceased had fallen. Learned Counsel

also contends that his going to the Police Station is unbelievable and his immediate reaction ought to have been to call the neighbours for his help. In support of his submission, learned Counsel has placed reliance on the case of **Anil Phukan** v. **State of Assam**(1993 Cri. L. J. 1796) and **Bheema** v. **State of Rajasthan**(2005(1) Acquittal 602).

18. In the first case of **Anil Phukan** v. **State of Assam**(supra) the Apex Court has stated that a conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone but where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction and it is only when the courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect. In the case of **Bheema** v. **State of Rajasthan**(supra) a Division Bench of Rajasthan High Court followed that principle as laid down in the case of **Anil Phukan** v. **State of Assam**(supra).

19. At the outset, we must observe that this is not a case which rests on

the solitary evidence of an eye witness. It is a case where the accused has admitted his presence in Jerry's bar along with the deceased but has come with an explanation to which we have already referred to. It is also a case where there is circumstantial evidence to connect the accused with the murder of the deceased as well as corroborative evidence supporting the version given by PW9/Jeronimo, at every stage.

20. PW9/Jeronimo's presence at the counter of their bar is natural and probable and it is sufficiently corroborated by his own brother, namely, PW14/Ivor. We do not see any reason why PW9/Jeronimo should implicate one customer for another. He has categorically stated that when he heard one of them saying “don't hit”, “don't hit”, he went to the room and saw the accused with the knife in his hand and the accused assaulting the deceased with the knife and the accused asked him as to what he was doing and told him to get out and then shouted for help but as no one came he went to the Assonora Out-Post and brought the Police there. He also stated that he saw the deceased fallen down, though he stated that he did not observe the manner or the posture the deceased had fallen down, and, this in our view speaks of his sincerity to state the truth, rather than falsehood. We are unable to accept that PW9/Jeronimo had not seen the incident at all. If at all he was unable to tell on what part of the body of the deceased the accused had assaulted him it is probably because PW9/Jeronimo saw the incident in a quick action and moved away after having seen the accused in action, and, after the accused threatened him. The evidence of a witness has got to

be read as a whole and so read, we are of the view that his version has a ring of truth and inspires confidence. The discrepancies sought to be brought to light in his evidence, on behalf of the accused, are no discrepancies at all. It is now well settled that minor discrepancies if there are any, cannot be given undue importance. In fact, the evidence of PW9/Jeronimo is corroborated at every step.

21. The learned trial Court observed that the accused had not denied that PW21/Head Constable Parab had made a station diary entry when PW9/Jeronimo came and reported at the Out-Post of the fight in his bar. In fact, it was expected of the learned trial Court to have called for the station diary and verified for himself what the witnesses had stated was true or not. We called for the station diaries of the said Out-Post as well as of Mapusa Police Station and we have examined the same and what is stated by PW9/Jeronimo and PW21/H. C. Parab is amply reflected in the station diary of the Out-Post vide entry No.12 recorded at 15.30 hours. Moreover, the version of PW9/Jeronimo is corroborated by PW21/H. C. Parab who stated that after PW9/Jeronimo reported about the fight which was going on between two persons at Jerry's bar at Assonora he made an entry in the station diary at No.12 of 2004 at 3.30 p.m. and along with PW23/Constable Prashant came to Jerry's bar where he saw the said motor cycle No. GA-01-F-2899 and the accused standing near the said motor cycle with blood stained clothes on him. He also described the clothes the accused was wearing and stated that thereafter he took the accused inside the bar where he saw the deceased lying on the floor with injuries on his chest. He also stated that he

phoned the P.C.R as well as the Duty Officer at Mapusa Police Station and informed them about the incident and requested them to send the jeep. He stated that he also saw a knife with black colour handle on the table. The station diary of Mapusa Police Station shows that there was an entry made at 15.30 hours regarding the receipt of phone call from P.C.R stating that somebody was fighting at Jerry's bar in Assonora and that P.C.R Robert 3 with staff was sent there. It also shows that at 15.48 hours a phone call was received from PW21/H. C. Parab. Entry at 16.20 hours shows that the Police stationed at Casualty in Asilo Hospital informed that the unknown person brought by the P.C.R van was found dead. The entry at 16.30 hours shows that PSI Arjun Y. Naik returned with the accused, etc. PW23/Constable Prashant has again corroborated the version of PW21/H. C. Parab, except to say that PW21/H. C. Parab had taken a personal search of the accused in his presence. In our view, the evidence of PW9/Jeronimo is truthful, reliable and convincing and the same shows that it is the accused who is the author of the injuries inflicted upon the deceased.

22. Learned Counsel on behalf of the accused has also submitted that PW9/Jeronimo has not explained the injuries on the accused. In this regard we may note that no explanation was sought from PW9/Jeronimo as regards the said injuries and therefore he cannot be blamed for not explaining them. Even otherwise, non explanation of the injuries on the accused assumes importance only where the defence gives a version which competes in probability with that of the prosecution but that is not the case herein.

23. The Apex Court in **Sucha Singh and another** v. **State of Punjab**((2003) 7 SCC 643) after referring to several of its decisions has stated that non-explanation of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries. The Apex Court also stated that it is for the defence to put questions to the prosecution witnesses regarding the injuries on the accused persons and when that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. The Apex Court also stated that it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. The injuries found on the accused were very simple in nature and could have been caused while the deceased was defending himself from the brutal assault by the accused with the said knife.

24. The learned trial Judge, as far as the charge under Section 392 I.P.C. is concerned, has believed the solitary statement of PW23/Constable Prashant that the accused was personally searched at the spot and nothing was found with him and has given benefit of doubt to the accused stating that the said chain of the deceased might have been planted in the pocket of the accused prior to conducting the arrest panchanama. Deriving support from the said observation, learned Counsel on behalf of the accused, contends that the knife was also planted by the

Police. We are unable to accept such a contention. Firstly, it must be observed that until PW21/H. C. Parab was examined in the case it was nobody's case that the accused was searched by anyone much less by PW21/H. C. Parab upon his arrival along with PW23/Constable Prashant to the scene. PW21/H. C. Parab was heading the Police party from the Out-Post and he had not at all stated that he had carried out any search of the accused at the scene and in such a situation, in our view, we find that undue importance was given by the learned trial Court to the solitary statement of PW23/Constable Prashant to the effect that the accused was searched and nothing was found with him. Undue weightage could not be given to the said solitary statement of a constable to come to the conclusion that if the accused was searched, gold chain would have been found with him at the time when he was searched. As far as the knife is concerned, that it was in the room of the bar, is a fact which is established by the independent witnesses as well as by the Police witnesses and confirmed from the photographs from the scene taken by the photographer PW12/Shri Kanekar, and, therefore the contention that the knife could be planted cannot be accepted.

25. Learned Counsel on behalf of the accused further contends that the accused and the deceased were friends and therefore the accused would not have assaulted and murdered his own friend. This is a case where motive is not alleged by the prosecution nor proved. The learned trial Court had referred to **Yunis** v. **State of M.P.**(AIR 2003 SC 539) wherein the Apex Court has stated that it is settled law that establishment of motive is not a sine qua non for proving

the prosecution case. The learned trial Court also referred to **Bikau Pandey and others** v. **State of Bihar**(AIR 2004 SC 997) wherein the Apex Court stated that where there is direct evidence to establish the crime, proof of motive is of no consequence and pales into insignificance. As stated by a Division Bench of this Court in **Sarvanand Gaonkar** v. **State of Goa**(2007(1) Bom.C.R.(Cri.) 234) motive is always relevant and bears a special significance in cases which are based on circumstantial evidence. Absence of motive does not weaken a case but its existence certainly strengthens the case and it assumes significance when there is a doubt. It is of no consequence if the evidence is strong, and, that is the case herein.

26. The prosecution has also proved that the clothes of the accused were found with the blood of the deceased and that again not only corroborates the version of PW9/Jeronimo but further independently proves that the accused is the assailant of the deceased. It was contended on behalf of the accused that the said clothes are not of the accused but this contention needs to be rejected because the evidence of PW8/Gokuldas is reliable and convincing. The blood group of accused was determined to be O Rh positive and that of the deceased as A Rh positive. When the clothes of the accused Exh.1 and Exh.2 were sent to C.F.S.L. they were found with blood of group A.

27. Lastly, learned Counsel on behalf of the accused, contends that the version given by the accused in his statement under Section 313 is plausible and

therefore the accused deserves to be given benefit of doubt. In our view, the explanation given by the accused is far from plausible. It is difficult to believe that the accused would go out of the bar, in case a stranger had come and picked up a quarrel with his friend. Again, in case a stranger had come and assaulted his friend the least which was expected from the accused was to call for the bar owner who was available at the counter or at least raise alert and report the matter to the Police thereafter and not to hang around, not knowing what to do and that is what the accused did in this case. The accused gave no description of the stranger. The contention that the accused was drunk also cannot be accepted on the basis of the evidence of PW14/Ivor and PW16/Dr. Jyoti which shows that not much drinks were consumed and very less percentage of alcohol was found when the accused was examined by Dr. Jyoti. The finding of blood on the handle grips of the motor cycle indicates that the accused was about to go away from the scene. Once, it is accepted by the accused that he and the deceased were drinking together at the said bar and next the deceased was found in a pool of blood with injuries on his body and the accused himself with his clothes soaked in blood it could certainly be inferred, even if there was no other evidence, that the accused was the author of the injuries on the deceased. The accused could explain that he was not the author not by his own bare self serving statement but proving the same on balance of probabilities.

28. The prosecution evidence shows that the accused assaulted the deceased with the said knife continuously, mercilessly, and forcefully and inspite

of the deceased defending himself with his bare hands, and inflicted one of the injuries which was 12 cms. deep and which penetrated the heart of the deceased. The accused, therefore, could not be convicted for any lesser offence than under Section 302 I.P.C.

29. Consequently, we find that there is no merit in this appeal and the same is hereby dismissed.

R. S. MOHITE, J.

N. A. BRITTO, J.

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